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In the Supreme Court of the United States

October Term, 1941 - Nos. 1209 and 1210

Gladys M. Westphal, widow of F. Gilbert Westphal, Shirley June Westphal, Janice Beth Westphal, and Ellen Mae Westphal, minors, children of Gladys M. Westphal and F. Gilbert Westphal, by Gladys M. Westphal, their guardian ad litem,

Petitioners,

vs.

Kansas City Life Insurance Company, Kansas City Missouri, a corporation,

Respondent.

Gladys M. Westphal, widow of F. Gilbert Westphal,

Petitioner,

vs.

Kansas City Life Insurance Company, Kansas City Missouri, a corporation,

Respondent.

Brief in Opposition to Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

BERNARD V. BRADY,
Counsel for Respondent,
Kansas City Life Insurance Company.

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Brief in Opposition to Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

To the Honorable, the Chief Justice and the Associate Justices of the Supeme Court of the United States:

Respondent, Kansas City Life Insurance Company, answering the petition for writs of certiorari on file herein, respectfully represents as follows:

Opinions Below.

The opinion of the Circuit Court of Appeals for the Seventh Circuit (R. 279-284) was written by Circuit Judge Kerner; dissent by Circuit Judge Evans (R. 284-287); reported in 126 F. (2d) 76. The opinion of District Judge Duffy (R. 229-240) is reported at 37 F. Sup. 300.

Jurisdiction.

Jurisdiction is invoked under Section 240 (a) of the Judicial Code (28 U. S. C. A., Sec. 347).

Opinion and judgment of the Circuit Court of Appeals were filed February 5, 1942 (R. 287). Petition for rehearing was filed February 19, 1942 (R. 288), and denied February 26, 1942 (R. 289). Petition for certiorari was filed in this Court May 4, 1941, and service of notice thereof with printed copy of record and brief of petitioners was made on respondent May 14, 1941. The jurisdiction of the District Court depended on diversity of citizenship.

Petitioners seek to review decision of the Circuit Court of Appeals which granted respondent's motions for direction of verdict and judgment n.v.o., reversing the District Court.

Statement of Case.

In view of petitioners' failure to have made anything in the nature of a fair statement of the case, a statement by the respondent seems necessary:

The controlling facts, accepted as clearly established by both Courts below, and set out at some length in the District Court's opinion (R. 229-239), and more concisely in the opinion of the Circuit Court of Appeals (R. 279-284) are: F. Gilbert Westphal, aged 33, living with his wife and three young children in a Milwaukee suburb, of good family connections and *reputed* to be of excellent character

(R. 84-98, 100-105, 107-109, 112-115) and *reputed* to be domestically happy (R. 84-98, 107-109, 112-115), was, in fact, involved in some domestic difficulties (see his wife's letter, R. 185) and was a studied embezzler (R. 230-231, 232-233, 280-282). For nearly a year he had been embezzling money from his employer and falsifying the records (R. 231, 122-125, 143-150, 154-159, 280), and detection was imminent (R. 231, 233, 280-281). Thereupon, he fled, having been last seen November 5, 1931 at 7:30 P. M. when he brought his automobile into a public garage 1 1/2 blocks from his apartment and left the garage with a valise in his hand (R. 152-153, 282, 230).

He left two letters, one to his wife (R. 232, 281), and one to his employer (R. 232-233, 282), in which he admitted his peculations and declared, in the letter to his wife, "* * * I am gone, *not to return until* I prove before myself & God that I am worthy of you & our three beautiful daughters." (R. 281) (italics ours) and in the letter to his employer:

> "I myself am going to try to get to some town in which I can get an absolutely new start and try to make good—or I will pass out in the attempt.
>
> "There seems to be no other way out and I feel that I cannot look you in the eye again until my self respect and my innermost self tells me that I can come to you with clean hands and in a position to pay all that I am in arrears."
>
> (R. 282)

He had felt ill and taken some soda the night before he left (R. 36-37), but on the morning of his departure he told his wife that he felt "all right" (R. 37-38).

The amount of money that he had embezzled exceeded $1,500.00 (R. 230). His wife could not account for (R. 30-31, 55) and the evidence did not otherwise disclose any disposition of the embezzled moneys and certain portions

of his earnings (R. 91, 113). In addition, two weeks before he fled, he had borrowed $400.00 on his note at a bank, which he left unpaid (R. 160, 231, 281), and at some time before he fled he had put a $250.00 chattel mortgage on his automobile (R. 231); and his accounts at two banks were overdrawn (R. 174, 185, 281); and on the very day that he left he obtained $450.00 cash at a local bank on a check which was subsequently dishonored for lack of funds (R. 141-142, 231, 281). No report of his disappearance to any public authorities nor request to locate him was made by his wife or relatives (R. 111, 138-139). No unidentified male body was found in Milwaukee County for a number of months after his disappearance (R. 137).

Twenty months after his disappearance, his wife instituted suit and obtained a judgment of divorce from him on the ground that he had deserted her (R. 55). Seven years passed without tydings of or from him. No premiums being paid after he left, his life insurance policies lapsed, one 21 days, one 5 months and 25 days and one 6 months and 23 days after his departure. Two of the policies had been issued less than one year (R. 7, 8) and one had been in force slightly over one year (R. 4)when he disappeared. All of the policies provided against recovery in case death was by suicide within one year from issuance of policy.

On this state of the evidence, the respondent moved for a direction of verdict (R. 229), on the ground of insufficiency of evidence to sustain a verdict for the plaintiff, on which the Trial Court reserved decision under rule 50 (b) (R. 229), and submitted the case to the jury, which found that the insured had died within twenty-one days of the date he fled (R. 226, 279). Respondent moved for judgment n.v.o. on the same ground (R. 228-229-230). The Trial Judge in his opinion expressed "considerable concern" as to whether the evidence presented a jury issue and declared that, if it were proper for him to pass on the

evidence, he would "without hesitation" have found no death within the lapse periods, as the letter from the insured to his employer "* * * would have been decisive in my mind " (R. 233). But the Trial Court thought that under the Wisconsin decisions "the time of death" was for determination by the jury (R. 238). The Circuit Court of Appeals, after careful analysis of the Wisconsin decisions, concluded the contrary (R. 279-284). The dissenting opinion in the Circuit Court of Appeals, while purporting to apply the Wisconsin decisions, cited and apparently relied on decisions from a number of other states (R. 285-286). The claim of petitioners was that Westphal "* * * met his death at or about November 5, 1931, when he was last seen" (R. 5, 7, 9).

ARGUMENT.

I.

In Wisconsin, the presumption from seven years' absence has no evidentiary effect whatever toward proving that the person was dead or alive at any particular time in the seven-year period — that must be established by other affirmative proofs.

In Wisconsin, the presumption of death from absence for 7 years without tydings is evidentiary that the absent one is dead *at the expiration of the 7-year period.* That presumption has no evidentiary effect whatever as to whether the absent one was dead or alive at any particular time *during the 7-year period.*

Whiteley vs. Equitable Life Assurance Soc., 72 Wis. 170, 39 N. W. 369;

White vs. Brotherhood of L. F., 165 Wis. 418, 162 N. W. 441;
Delaney vs. Metropolitan L. Ins. Co., 216 Wis. 265, 257 N. W. 140;
Davie vs. Briggs, 97 U. S. 628.

The burden is on the party so claiming to establish, by other affirmative evidence, death at some particular time within the 7-year-period, *the presumption being of no assistance in that respect.*

Whiteley vs. Equitable (supra);
White vs. Brotherhood (supra);
Delaney vs. Metropolitan (supra);
Dobelin vs. Maccabees, 171 Wis. 54, 174 N. W. 897.

II

In Wisconsin an inference from circumstantial evidence must be a rational and logical deduction from established facts; and it cannot be one of several inferences which might, with equal propriety, be drawn from the same facts.

"But an inference must be drawn from established facts which logically support the same."

Wm. Esser & Co. vs. Industrial Commission, 191 Wis. 473, 477, 211 N. W. 150.

"The inference must not only be rational, but it must be a logical deduction from the established facts and not one of several inferences which might with equal propriety be drawn from the same facts."

Hill Dry Goods Co. vs. Industrial Commission, 217 Wis. 84, 258 N. W. 336, 339.

Quoted with approval in *Employers Mutual Liability Co. vs. Brower*, 224 Wis. 485, 272 N. W. 359.

III.

To warrant or sustain a jury's verdict, the evidence must establish the requisite facts to a *reasonable certainty*.

"Verdicts * * * must be bottomed at least upon a reasonably certainty."

Marcott vs. Minneapolis, etc. Ry. Co., 147 Wis. 216, 223-224, 133 N. W. 37.

"To warrant a recovery the cause of the injury must be established to a reasonable certainty." (citing cases)

Zuwodnicek vs. Higgins Spring & Axle Co., 151 Wis. 118, 120, 138 N. W. 48.

"That a finding or verdict must amount to a reasonable certainty is the law."

Vilter Mfg. Co. vs. Industrial Commission, 192 Wis. 362, 365, 212 N. W. 641.

IV.

When proof to reasonable certainty depends upon probabilities from circumstantial evidence, the probabilities must preponderate so strongly as to establish the particular fact to a reasonable certainty.

"Having in mind that a verdict may be sustained upon a preponderance of probabilities to a reasonable degree of certainty, that means no more than that probabilities must preponderate so strongly that the fact sought to be proven is established to a reasonable certainty."

Bruins vs. Brandon Canning Co., 216 Wis. 387, 402, 257 N. W. 35.

"Preponderance of mere possibilities is, of course, not the equivalent of a preponderance of probabilities. Mere possibilities leave the solution of an issue of fact in the field of conjecture and speculation to such an extent as to afford no basis for inferences to a reasonable certainty, and in the absence of at least such inferences there is no sufficient basis for a finding of fact."

Creamery Package Mfg. Co. vs. Industrial Commission, 211 Wis. 326, 248 N. W. 140.

V.

Where circumstantial evidence is relied on, and the circumstances indicate that either of two things might have occurred, one event being actionable and the other not, no jury issue is made.

In a suit for proof of damage from a fire, the evidence disclosed that there were two fires, either of which might possibly have spread and caused the damage, and the defendant was responsible for one fire but not for the other; it was held that the evidence did not present a jury issue.

Marvin, et al, vs. C. M. St. P. & P. Ry. Co., 79 Wis. 140, 47 N. W. 1123;

Megow vs. C. M. St. P. & P. Ry. Co., 86 Wis. 466, 56 N. W. 1099.

VI.

In such a situation, if the evidence leaves the inference of the occurrence of one event as permissible or as probable as the other, the evidence cannot sustain a verdict for the party having the burden of proof.

"With these two possible causes to account for the explosion, the burden of proof, of course, rested on

> the plaintiff to prove the one for which defendant would be liable. It did not suffice that one might be as probable as the other. It was not the situation of two possible causes, one or the other of which the jury must adopt, * * *".

Held no jury question.

Musbach vs. Wisconsin Chair Co., 108 Wis. 57, 67-68, 84 N. W. 36.

Of course, we do not here deal with a situation of two possible events, one or the other of which *must* be adopted from the evidence.

Where a boy six years old was killed by a locomotive on a railroad train and the circumstances disclosed that he might have gotten on the track through a hole in a gate resulting from a broken board or by having crawled through the fence at some other point, it was held that there was no more probability that he entered at the break in the gate than through any other point in the fence, and a verdict so holding must be reversed as based on conjecture.

Hotchkiss vs. Green Bay, etc., R. R. Co., 153 Wis. 340, 345, 141 N. W. 231.

Where it was permissible on the evidence to infer that the accident came from an actionable cause or a non-actionable cause, the Court said:

> "Even though one inference is as permissible as another, the jury could do no more than to guess at the cause of the accident, and mere conjecture will not sustain verdicts."

Thomas vs. Steppert, 200 Wis. 388, 393-4, 228 N. W. 513.

VII.

Where, as here, circumstantial evidence alone is relied upon, and the *established facts* permit, with equal consistency or propriety, differing inferences to be drawn, the choice rests on conjecture and the party with the burden of proof has not made a jury issue.

(a) This principle has obtained in Wisconsin from an early day down to the present time. It has been stated in varying language, but to the same end. In the old case of *Hyer vs. Janesville,* 101 Wis. at 377, 77 N. W. at 731, the Wisconsin Supreme Court declared:

> "In a case like this it is incumbent upon the plaintiff to show by evidence, with reasonable distinctness, how and why the accident occurred. Morrison vs. Phillips & C. Const. Co., supra. **To present two or more states of a case upon which a jury may theorize as to the real cause of the accident, putting one conjecture against another and determining which is the more reasonable, comes far short of making a case.**" (Bold type supplied)

This early doctrine as stated in the *Hyer* case was cited and quoted with approval as late as 1940 in—

Walraven vs. Sprague, Warner & Co., 235 Wis. at 266, 292 N. W. at 885.

The *Hyer* case was also quoted and cited with approval in 1938 in

Lansing vs. John Strange Paper Co., 227 Wis. at 443, 278 N. W. at 858.

And in the same year the Wisconsin Supreme Court again cited and quoted the *Hyer* case with approval, re-affirming in—

Reichert vs. Rex Accessories Co., 228 Wis. at 440, 279 N. W. at 6,

by specific quotation the following doctrine:

> "To present two or more states of a case upon which a jury may theorize as to the real cause of the accident, putting one conjecture against another and determining which is the more reasonable, comes far short of making a case."

In the case of—

McDonald vs. Provident Savings Life Assurance Society, 108 Wis. at 219, 84 N. W. at 156,

the Wisconsin Supreme Court explained the rule, as follows:

> "The burden of proof to establish the claim that the note was received as a payment of the premium was on plaintiff, and, while an express contract may be established in whole or in part by circumstantial evidence (*Leitgabel vs. Belt,* ante, p. 107), mere circumstances **that point one way as reasonably and significantly as the other** are insufficient for that purpose. In such a situation the controversy should not be submitted to the jury. It involves a question calling for the exercise of the judicial function to declare the right as a matter of law. But if the question is submitted to a jury and they be permitted to guess or conjecture as to where the truth lies, if the result is contrary to the legal conclusion which the court should declare, it ought not to be allowed to stand as a correct determination of the rights of the parties. *Hyer vs. Janesville,* 101 Wis. 371; *Cawley vs. La Crosse City R. Co.,* 101 Wis. 145. (Bold type supplied)

In 1935 the Wisconsin Supreme Court without reference to the early cases again voiced its approval of this rule when it stated in *Hills Dry Goods Co. vs. Industrial Comm.,* 217 Wis. at 84, 258 N. W. at 339, per Rosenberry, C. J.:

> "In this case there is no direct testimony that the claimant fell into the elevator shaft while operating, or attempting to operate, or even getting ready to operate, the elevator. Do the facts adduced upon the hearing permit of an inference that he was operating the elevator? In this connection an inference is to be clearly distinguished from a mere guess or conjecture. As was said in Creamery Package Mfg. Co., supra, 'inferences * * * must be drawn from established facts which logically support them.' In other words, they must be rational. The inference must not only be rational, but it must be a logical deduction from the established facts **and not one of several inferences which might with equal propriety be drawn from the same facts.**" (Bold type supplied)

And in 1937 the Court in—

> *Employers Mut. Liability Ins. Co. vs. Brower,* 224 Wis. at 490, 272 N. W. at 361,

used with approval the following language taken from the *Hills Dry Goods Co.* case:

> "The inference must not only be **rational,** but it must be a logical deduction from the established facts **and not one of several inferences which might with equal propriety be drawn from the same facts.**" (Bold type supplied)

Exactly that test of sufficiency of the evidence was applied by the Wisconsin Court in—

> *Dobelin vs. Maccabees,* 171 Wis. 54, 174 N. W. 897,

a disappearance case where the issue was whether the man had died within four years and nine months after disappearance, and the finding depended on inferences to be drawn from purely circumstantial evidence. The Court said that failure to communicate by failing to fulfill the promise to repay an advance of money within fifteen days was—

> "* * * fully as consistent with the theory of continued life, coupled with disability or disinclination to repay, as with an inference that such obligation of repayment had been abrogated by speedy death". (171 Wis. at 58)

Thus, equally consistent inferences being deducible from the circumstances, one pointing to continued life and the other to death, at the time in question, the plaintiff "* * * did not meet the burden of proof * * *" and the judgment was reversed.

That, precisely, was the basis of the determination by the Circuit Court of Appeals, using the very language of the *Dobelin* case (R. 284).

VIII.

The state of the evidence in this case required the application of that principle.

(a) Petitioners' proof tended to establish Westphal as a man of good repute with affection for his wife and children, whose disappearance, *unaccounted for,* might warrant inference of death *at that time.*

(b) But respondent's uncontradicted proof disclosed him to be an embezzler who fled when detection was imminent, who prepared for flight by gathering in substantial cash funds topped by $450.00 drawn on an invalid check the very day he departed, and who left solemn written declarations that he was going to try a new start in some other place and would not return until able to repay his defalcations.

(c) It was not a question of disputed proofs or contradictory evidence, nor of choice between permissible inferences from particular evidence or from contradictory evidence; nor was it a question of giving petitioners' evidence the most favorable view.

(d) It was simply that to the circumstances adduced by petitioners there had been added by uncontradicted proofs additional circumstances showing the cause of the disappearance, and showing a plan and an avowed purpose of concealment for a considerable period of time.

(e) Taking into consideration all the established facts, it could be inferred with greater or with equal consistency that life had continued for some extended period of time than that he suffered death speedily after his flight. In that situation, Wisconsin law clearly required a direction of verdict for respondent. The Circuit Court of Appeals so concluded (R. 284).

It is elementary that circumstantial evidence which, standing alone, may be considered of "substantial character" for the purpose of drawing inferences, can lose that "substantial character" when additional evidence is offered which discloses further circumstances.

American Oil Co. vs. Frederick, 47 F. (2d) 54, 56 (6th C. C. A.);

Strider vs. Penn. R. Co., 60 F. (2d) 237, 239 (6th C. C. A.).

IX.

Petitioners' statement of "Reasons Relied on for the Allowance of the Writs" assigns reasons not appropriate to the issue involved.

(a) There does not exist the asserted failure to have applied the state law.

We have indicated above the settled law of Wisconsin in respect of the degree of proof required to permit of a jury verdict when circumstantial evidence alone is relied on. It is to be borne in mind here that Wisconsin decisions cited in the petitioners' brief dealing with the scope per-

missible to a jury in drawing inferences are cases which deal with either disputed testimony or conflicting evidence, direct or circumstantial, or choice of inferences permissible from a particular fact, or the adoption of one of two alternatives, when from the evidence one or the other must be adopted. The cases that we have cited above are the ones which deal specifically with the type of issue which was presented in the instant case, i.e. the matter of inferences permissible to be drawn from undisputed circumstantial evidence alone, standing as established facts.

It is the settled law of Wisconsin that the presumption from seven years' absence without tydings has no evidentiary effect whatsoever on the issue of whether the absent person was dead or alive at any particular time within the seven-year period.

Whiteley vs. Equitable Life Assurance Society, 72 Wis. 170, 39 N. W. 369;

White vs. Brotherhood of Locomotive Firemen, 165 Wis. 418, 162 N. W. 441;

Delaney vs. Metropolitan Life Ins. Co., 216 Wis. 265, 257 N. W. 140.

In attempting to prove death at some particular time within the seven-year period, a showing of disappearance with no known cause, reason, or explanation, naturally permits inference of death at time of disappearance.

White vs. Brotherhood of Locomotive Firemen, 165 Wis. 418, 162 N. W. 441;

Delaney vs. Metropolitan Life Ins. Co., 216 Wis. 265, 257 N. W. 140.

But where, either on account of the looseness of home ties or a showing of motives that prompted disappearance and concealment, the disappearance does not bear the inference of death at that time, then there is no basis in the

evidence which permits a finding of death fresh on the disappearance. The Wisconsin Supreme Court applied exactly that test in the case of *Doeblin vs. Maccabees,* 171 Wis. 54, 174 N. W. 897, in which the Court applied the well established principle outlined at heading II of this brief, and held that in such situations, giving due effect to all of the established facts, an inference of "continued life" was as consistent as an inference of speedy death. This was the principle which the Circuit Court of Appeals applied in the instant case (R. 284). It recognized that if a man with strong home ties were to disappear with no known cause or reason therefor, an inference of death at or about the date of disappearance was permissible; but it held that where, as here, the undisputed evidence disclosed the man to have been an embezzler whose detection was imminent, and who had gathered in a considerable sum of cash to facilitate his flight, and who had left letters solemnly declaring that he would not return until he had tried to make good in some other place and could repay his peculations—in short, an avowed plan of concealment and non-communication for some considerable period of time—those undisputed facts could not be disregarded, and, taking into consideration all of the established facts, an inference of continued life for some considerable period of time was as consistent or appropriate as an inference of death at the time of departure; and as pointed out in earlier parts of this brief, the Wisconsin Supreme Court has repeatedly held that such a state of evidence presents no jury issue, but presents only choice between conjectures, not permissible under Wisconsin law.

(b) There does not exist the asserted conflict in decisions between different circuits.

We do not understand just what petitioners mean by the assertion that one of the reasons for the allowance of the writs is conflict between the decisions of different cir-

cuits. We find nothing in petitioners' brief to support that contention.

As indicated above, the Circuit Court of Appeals applied the required Wisconsin law on the undisputed facts by ruling that it was just as consistent to infer that Westphal had carried out his avowed purpose of concealment, non-communication, and an attempt to earn enough to pay his defalcations, and continued on that course for years, as it was to infer that he died fresh on his departure and before having opportunity to have attempted to put his avowed plan into effect. In ordinary reason and common sense, it would seem much more probable to infer that he did attempt his avowed purpose and was in the course of it for such period of time as the carrying out of such a purpose would normally have required, or that after making the attempt to carry out his avowed purpose he failed, and, consistently with his own declarations, for that reason never returned or communicated. It was not necessary, however, that the greater probability lie in that direction so far as the respondent's case is concerned. It was entirely sufficient, as the Circuit Court of Appeals held, that the inferred continuance of life for some period of time was at least as consistent on the established facts as any theory that he died fresh on his departure.

The same rule applied in Wisconsin, though worded somewhat differently, is applied generally in the various Federal Circuits:

> "* * * when proven facts support equally two inconsistent inferences, there is no substantial evidence to support either, and judgment must go against the party having the burden."
>
> *United States vs. Barry, et al,* 67 F. (2d) 763, 765 (C. C. A. 6th) (Certiorari denied *Barry vs. United States,* 54 S. Ct. 857, 292 U. S. 648, 78 L. Ed. 1498).

"If the testimony leads as reasonably to one hypothesis as to another, it tends to establish neither."

Deadrich vs. U. S., 74 F. (2d) 619, 622—9th C. C. A.

Evidence consistent with an hypothesis of negligence, and also with one of no negligence, tends to establish neither.

Wilson vs. Borden, 62 F. (2d) 866, 868 (C. A. of D. C.).

"* * * where proven facts give equal support to each of two inconsistent inferences, judgment must go against the party upon whom rests the burden of sustaining one of these inferences as against the other."

Liggett & Myers Tobacco Co. vs. DeParcq, 66 F. (2d) 678, 684 (8th C. C. A.).

"The case falls within the well settled rule that evidence which is equally consistent with two hypotheses, under one of which a defendant is liable, and under the other of which it is not liable, supports neither hypothesis."

New York Life Ins. Co. vs. King, 93 F. (2d) 347, 353 (8th C. C. A.);

Mutual Life Ins. Co. vs. Zimmerman, 75 F. (2d) 758, 762 (5th C. C. A.);

Kehoe vs. Comm., 105 F. (2d) 552, 555 (3rd C. C. A.).

To the same effect:

Texarkana Bus Co. vs. N. L. R. B., 119 F. (2d) 480, 486;

Bouner vs. Texas Co., 105 F. (2d) 552, 555;

Southern Ry. Co. vs. Stewart, 119 F. (2d) 85, 89;

Eggen vs. U. S., 58 F. (2d) 616, 620;

Cox vs. U. S., 96 F. (2d) 41, 43;

Hoskins vs. U. S., 120 F. (2d) 464, 466;
Cupples Co., etc., vs. N. L. R. B., 106 F. (2d) 100, 114;
A. & R. Realty Co. vs. Northwestern Mutual Life Ins. Co., 95 F. (2d) 703, 709;
Svenson vs. Mutual Life Ins. Co., 87 F. (2d) 441, 443;
Henry H. Cross Co. vs. Simmons, 96 F. (2d) 482, 486;
E. I. DuPont, etc., Co. vs. Baridon, 73 F. (2d) 26, 31;
P. F. Collier & Son Co. vs. Hartfeil, 72 F. (2d) 625, 630;
Conn. General Life Ins. Co. vs. Allen, 64 F. (2d) 840, 843;
May Department Stores Co. vs. Bell, 61 F. (2d) 830, 842;
Ft. Smith Gas Co. vs. Cloud, 75 F. (2d) 413, 416.

The cases of—

Mutual Life Ins. Co. vs. Zimmerman (supra), and
Claywell vs. Inter-Southern Life Ins. Co., 70 F. (2d) 569,

illustrate the application of this rule to disappearance cases. In both of those cases, it was held that no jury issue was presented, although in both cases the facts were so much stronger in favor of the plaintiff than are the facts in the present case as to leave the cases on no comparable basis. In the *Claywell* case, the Court remarked:

> "*Undisputed* evidence which, taken as a whole, leaves one uncertain as to whether insured voluntarily disappeared or not lacks that degree of probability required * * *".

It may also be noted as pointed out by this Court in *Ruhlin vs. New York Life Ins. Co.*, 304 U. S. 202, since *Erie Railroad vs. Tompkins* a question of this kind is to be determined by the state law, and as to questions controlled by state law, conflict among circuits is not of itself a reason for granting a writ of certiorari.

(c) There does not exist the asserted conflict between decisions of the same circuit, and if there did that likewise would be without significance, as the applicable law is the state law.

We find nothing in petitioners' brief to indicate that the Circuit Court of Appeals' decision in the instant case is in conflict with any other decision or decisions of the same Circuit Court of Appeals. It would indeed be strange if other decisions of the 7th Circuit were in conflict with so settled a principle of law as that on which the decision in the instant case is grounded. Even if that were true, it would seem to be wholly without significance, in view of the fact, as pointed out above, that the applicable law is the state law.

(d) There does not exist the asserted conflict with decisions of this court.

We find no cases in the petitioners' brief in which this Court has passed upon the Wisconsin principle which deals with instances of circumstantial proof in which, considering all of the established facts, inferences for and inferences against a party's claim may be drawn with equal consistency or appropriateness. So we see no basis for petitioners' assertion that the decision of the Circuit Court of Appeals in the instant case is in conflict with the decisions of this Court. On the contrary, the decisions of this Court recognize and apply substantially the same principle recognized and applied in Wisconsin.

> "The evidence is consistent with an hypothesis that the tug was not negligent and with one that it was, and therefore has no tendency to establish either."

Stevens vs. The White City, 285 U. S. 195, 52 S. Ct. 347, 350, 76 L. Ed. 699.

"When a plaintiff produces evidence that is consistent with an hypothesis that the defendant is not negligent, and also with one that he is, his proof tends to establish neither."

Gunning vs. Cooley, 281 U. S. 90, 50 S. Ct. 231, 233, 74 L. Ed. 720.

"* * * where proven facts give equal support to each of two inconsistent inferences * * * judgment, as a matter of law, must go against the party upon whom rests the necessity of sustaining one of these inferences as against the other, before he is entitled to recover. * * * There being several inferences deducible from the facts which appear, and equally consistent with all those facts, the plaintiff has not maintained the proposition upon which alone he would be entitled to recover."

Penn. R. Co. vs. Chamberlain, 288 U. S. 333, 53 S. Ct. 391, 393, 77 L. Ed. 819.

The same principle is applied generally in the State Courts:

Crelich vs. Erie R. Co., 199 A. 771, 120 N. J. L. 414;

Spackman vs. Benefit Assn., 89 P. (2d) 490 (Utah);

Juchert vs. California Water Service Co., 97 P. (2d) 259;

National Life Assn. vs. Driskill, 138 S. W. (2d) 238 (Tex. Civ. App.);

Showalter vs. Western P. R. Co., 106 P. (2d) (Cal.);

Woodward Iron Co. vs. Goolsby, 6 So. (2d) 11 (Ala.);
Draper vs. Louisville & N. R. Co., 156 S. W. (2d) 626 (Mo.);
Wiederin vs. C. & N. W. Ry., 212 Ia. 1103, 237 N. W. 344;
Wright vs. Dubbelde, 42 S. D. 12, 172 N. W. 500.

(e) There does not exist the asserted violation of the Seventh Amendment, except consequentially as it may be said to exist in every instance in which a motion to direct a verdict is granted.

There is no federal statute in question, and neither the Seventh Amendment nor any other provision of the United States Constitution is drawn directly in question. If the petitioners' assertion of violation of the Seventh Amendment as a basis for review is well taken, then it would seem that every ruling on a motion for direction of verdict or motion for judgment n.v.o. draws the Seventh Amendment directly in question, and that every instance in which a Trial Court grants such a motion presents an appropriate ground for the defeated party to apply to this Court for certiorari. If certiorari is appropriate to cause a review of the quantum of evidence in every instance of direction of verdict or granting of motions n.v.o., the burden to be cast on this Court promises to be tremendous.

On the basis of the authorities cited in this brief, the ruling was a required ruling in conformity with established principles of Wisconsin law, and the decisions of this Court and of Federal Courts generally.

(f) **The repeated assertion in petitioners' brief that the decision of the Circuit Court of Appeals was a usurpation of the functions, and denied the petitioners jury trial according to the course of the common law, is unfounded. "Trial by jury" according to the course of the common law embodied, as an essential element, the right of the judge, upon a proper factual situation, to direct a verdict or to set aside a verdict returned by the jury.**

Capital T. Co. vs. Hof, 174 U. S. 1, 43 L. Ed. 873, 877, 19 Sup. Ct. 580;
Barrett vs. Virginian Ry. Co., 250 U. S. 473, 476;
Heron vs. Southern Pacific Co., 283 U. S. 91, 51 S. Ct. 383.

That principle has always been recognized in Wisconsin.

Malinowski vs. Moss, 196 Wis. 292, 220 N. W. 197;
Thoe vs. C. M. St. P. & P. R. R. Co., 181 Wis. 456, 195 N. W. 407;
Kiley vs. C. M. St. P. & P. R. R. Co, 138 Wis. 215, 119 N. W. 309, 120 N. W. 756;
Finkelstone vs. C. M. St. P. & P. R. R. Co., 94 Wis. 270, 68 N. W. 1005.

X.

Petitioners' Brief misstates some of the most important points of evidence: It presents an extremely partisan viewpoint, with no effort to present the facts fairly.

(a) Petitioners' brief, page 19, undertakes to deny the proof of embezzlement, and states that no one could tell if the account "• • • showed a balance one way or the other", and indicates that it was open to dispute or different inferences, that the amount proved embezzled was not at all clear and "is open to reduction". These are misstate-

ments of the evidence. Embezzlement was established by absolute and undisputed proofs (R. 119-136). The Trial Court so found in its opinion on the motions (R. 230, 231), and again so found in special findings on another issue (R. 246). The Circuit Court of Appeals so found (R. 280, 281).

(b) On page 20, petitioners' brief asserts that a system of collecting and accounting for premiums was maintained in the branch office "contrary to policy requirements", and "was not satisfactorily explained". This is a direct misstatement of the undisputed evidence (R. 119-136, 130, 190). The Circuit Court of Appeals stated the facts in this respect exactly as established (R. 280).

(c) On the vital point of when and where he was last seen, petitioners' brief, page 24, misstates the testimony by asserting that it is disputed that Westphal was last seen about 7:30 P. M. on November 5, 1931, leaving the garage with his valise in his hand. That fact was proved by an eye witness, the garage attendant, who was well acquainted with Westphal (R. 152-3). No witness testified to the contrary. Petitioners attempted to get in some hearsay statements from Mrs. Westphal as to what she was told by other persons (R. 50, 51), but these, on objection, were stricken out (R. 51). Both the opinion of the Trial Court (R. 230) and the opinion of the Circuit Court of Appeals (R. 282) have found it as an undisputed fact that Westphal was last seen at the time in question leaving the garage, with his valise in his hand.

(d) A reading of the opinion of the District Court (R. 229-239) and of the Circuit Court of Appeals (R. 279-284) will disclose the controlling facts to be as we have summarized them in this brief. That state of facts, however, cannot be found in the petition and brief of the petitioners. It would be quite proper for the petitioners to present and argue only their own proofs and the most favorable infer-

ences to be drawn from those proofs if we were dealing with a question of disputed testimony or evidence as to a particular fact, or disputed inferences susceptible of being drawn from a particular item of evidence, or of giving to the petitioners' evidence the most favorable point of view. In determining whether a jury issue is presented, a party may, of course, rely upon the version most favorable to him in respect of disputed or contradictory testimony, or the inference most favorable to him permissible to be drawn from a particular item of evidence. But here none of those problems is presented. The problem here is that of giving effect, according to the Wisconsin law, to all uncontroverted facts clearly established by the evidence. The petitioners disregard that, however, and, instead of assembling and dealing with all of the uncontroverted facts, ignore or misstate important uncontroverted facts established by respondent's proof, while devoting great space in the brief to stressing their own evidence.

(e) On pages 22-23 petitioners' brief undertakes to cast doubt on the authenticity of the letters left by Westphal. The signatures of both letters were proved without dispute to be his signatures (R. 179, 139). Both Courts below recognized the evidence as establishing without dispute the authenticity of those letters (R. 232-233, 281-282).

(f) The extent to which petitioners' brief goes in unfairly reflecting the facts may be judged by the passages at page 24 which explain that Westphal's contracting a social disease was the fault of respondent, not the fault of Westphal!

XI.

The Petition and Brief do not comply with the rules of this court.

(a) The statement of the matter involved is not "summary and short", but is prolix, partisan, and argumentative. This is evident from a mere reading of the petition. It has made it a rather difficult problem for the respondent to meet without having too lengthy a brief. A "summary and short" statement could have been made which would have clearly disclosed the issue involved.

(b) The brief is not "direct and concise", but is circuitous, long drawn out, and burdened with merely cumulative quotations and reiteration.

(c) The violation of the rules of this Court in those respects is carried to such an extent as to obscure rather than reveal the real question sought to be reviewed. Had the rules been complied with by petitioners' counsel, it would have avoided the necessity of respondent's making a statement of facts and would have, in respects, simplified the presentation of respondent's objections.

XII.

Suggestion of suicide answered.

(a) The dissenting opinion in the Circuit Court of Appeals seems to be based on the thought that the tenor of the letters was such as to warrant an inference of suicide inferentially connected with the time of departure. Such a thought was not entertained before the Trial Court, nor discussed in the briefs submitted to the Circuit Court of Appeals, so Judge Evans had not the benefit of a presentation on that question. Such a presentation would have

directed to his attention the extremely strong presumption against suicide which obtains in Wisconsin.

Fehrer vs. Midland Casualty Co., 179 Wis. 431, 434, 190 N. W. 910;

Menasha Woodenware Co. vs. Industrial Comm., 187 Wis. 21, 203 N. W. 906;

Wiger vs. Mutual Life Ins. Co., 205 Wis. 95, 236 N. W. 534;

Simmons vs. Industrial Comm., 211 Wis. 445, 448, 248 N. W. 443.

(b) That presumption could not possibly be considered as met or overcome by the evidence presented in the present case. Nor does the suggestion of suicide, as a mode of inferentially dating death as at the time of departure, take into account the fact that the policies, as pointed out in our statement of facts, contained provisions against recovery in the case of suicide, sane or insane, within one year from date of issue of the policies; and that two of the policies were issued within less than a year from the date of Westphal's flight. The suggestion of suicide rejects Westphal's own solemn declarations of a contrary purpose, and would be sheer conjecture.

(c) The disappearance cases relied on in petitioners' brief will be found, on examination, to be clearly distinguished on the facts from the instant case. For instance, the case of *Whiteley vs. Equitable Life Assur. Society*, 72 Wis. 170, 39 N. W. 369, much relied on in petitioners' brief and apparently in the dissenting opinion below, has general language quite appropriate to the facts of that case—which were: the wholly unexplained disappearance of a man while on a business trip, no cause, reason, or explanation whatever being shown by the evidence. On such facts, the case was comparable to the case of *Delaney vs. Metropolitan Life Insurance Co. (supra)* and similar cases in Wisconsin

and elsewhere. But such factual situations have no basis of comparison with the factual situation presented in the instant case, and language appropriate to such factual situation as existed in the *Whiteley* and the *Delaney* cases is wholly inappropriate if transposed and attempted to be applied to a factual situation such as the instant one. A perfectly clear line of demarcation classifies the Wisconsin disappearance cases and puts on one side the factual situations which involve the person who disappears without any explanation or showing of adequate reason or motive. In those cases, an inference of death at the time of disappearance is permissible; but when additional circumstances, such as those of the instant case, are added by undisputed evidence, showing a strong motive for disappearance, showing a confession of criminal activity, and showing an avowed declaration of purpose to abscond and conceal himself until able to make good his defalcations,—the additional undisputed evidence cannot be arbitrarily rejected, and upon settled principles the plaintiff has not carried the burden of proof and no jury issue is presented. Typical of the differing factual situations presented by other cases cited in the petitioners' brief is the case of *Griffin vs. Northwestern Mutual Life Ins. Co.* (Michigan), 229 N. W. 509, relied upon in petitioners' brief, is seen to be of no assistance when the facts are examined, for in that case the evidence indicated that the missing man had taken passage on a ship and embarked on a voyage and disappered during the voyage; a factual situation not possibly to be compared with the evidence in the present case.

Petitioners' brief takes as a confession of error, and constantly reiterates, the statement from the opinion below that, upon the evidence, two inferences are made. Obviously, petitioners' counsel does not understand the sense in which that statement applies to the evidence. It could as well have been said that as many inferences were made as

to time of death as there were days in the entire seven-year period. The turning point of the case is that an inference that he had died on any day in the second, or third, or fourth, or fifth year after his departure was more consistent on the undisputed facts than an inference that he died at or about the time of his departure; and, even if the inferences were merely of equal consistency, as is evident at the minimum, that, on the settled law, would not make a jury issue.

Conclusion.

To say that on the evidence in this case a jury may be permitted to find that Westphal died at the time of his flight is to say that in every instance of a criminal absconding and in every instance of one absconding who has a strong motive so to do from whatever circumstances, and who leaves written declarations of that purpose at the moment of his flight, if he leave relatives for whom he has affection, juries may find, on nothing more, death at the time of departure. This seems contrary to all reason and common sense, for the very circumstances of the flight imply attempted concealment for a considerable period of time. To say that death occurred at the time of flight, rather than seven months, or a year or two or four years thereafter, is the sheerest conjecture. And a great advantage would be conferred on the beneficiaries of such criminals and absconders as against the policyholders who have no occasion to abscond and to default on premiums.

It is respectfully submitted that the petition for writs of certiorari should be denied.

Respectfully submitted,

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